Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1554

SUPER TIRE ENGINEERING COMPANY; SUPERCAP CORPORATION; and R. ROBERT SCHAEVITZ,
Petitioners,

vs.

LLOYD W. McCORKLE, Commissioner of the Department of Institutions and Agencies of the State of New Jersey; IRVING J. ENGELMAN, Director of the Division of Public Welfare of the Department of Institutions and Agencies of the State of New Jersey; FRED L. STRENG, Director of the Camden County, New Jersey Welfare Board; JUANITA E. DICKS, Welfare Director of the Municipal Welfare Department of the City of Camden, New Jersey; Intervenor Defendant; TEAMSTERS LOCAL UNION NO. 676, Affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR RESPONDENTS, McCORKLE AND ENGELMAN, IN RESPONSE TO MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF AND SUPPLEMENTAL BRIEF FOR PETITIONERS

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The third question presented by the Petition for Writ of Certiorari is: "Does the State grant of welfare assistance to strikers contravene federal labor policy by insulating one party—the striking union—from the economic disadvantages of a strike, and thus deviate from the State's required neutral position in collective bargaining?" In urging the Court to answer this question affirmatively, the petitioners argued that any payment of welfare benefits to strikers would be inconsistent with the National Labor Relations Act. This argument was not based on any factual assertion that New Jersey treats strikers differently from other needy persons who apply for welfare assistance. On the contrary, the common assumption in the Court of Appeals (See App. 48-49) and in the original briefs filed with the Court was that welfare benefits are available to strikers on the same terms as to all other needy persons.* In short, it was the petitioners' position in their original brief that the NLRA requires recognition of a special disqualification of strikers from eligibility for welfare benefits to which they would be otherwise entitled.

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* The regulations of the New Jersey Division of Public Welfare appearing at App. 129-139 clearly evidence an intention to treat the fact that an applicant for assistance is on strike as irrelevant, rather than to confer any special benefits. Furthermore, the record does not indicate how the phrase ". . . refuses, without just and reasonable cause, to seek work, or to make himself available for referral to and consideration by prospective employers. . . ." in these regulations has been construed administratively. Since the petitioners, prior to the filing of the supplemental brief, had relied on the theory that the NLRA prohibits the payment of any welfare benefits to strikers, regardless of the particular circumstances under which a non-striker may be disqualified from receiving benefits, there had been no need previously to explore the exact manner in which these regulations are interpreted and implemented by the State of New Jersey.

However, the supplemental brief now inverts this position and asserts, without any support in the record, that the State confers special benefits upon strikers which are not made available to other needy persons. The attempt at this late date to thus radically reformulate the question presented by this appeal is manifestly improper. Since the petitioners deliberately limited their substantive argument in the petition for writ of certiorari to the contention that *any* payment of welfare benefits to strikers was *per se* inconsistent with the NLRA, they should not now be permitted to urge an entirely different point. Under Supreme Court Rule 40(1)(d)(2), only questions presented in the petition for writ of certiorari will be considered by the Court, not questions subsequently introduced by the petitioner. *J. I. Case Co.* v. *Borak,* 377 U. S. 426, 428-429 (1964). Furthermore, although the State agrees with the observation in petitioners' motion that there were matters raised in oral argument which neither side had previously addressed in their briefs, this does not provide justification for the petitioners to project a question for decision which is substantially different from the questions presented by the petition for writ of certiorari. It is unquestionably appropriate for an appellate court to explore during oral argument issues beyond those directly presented by the case before it, in order to place the case in proper perspective, but "[t]he fact that the issue was mentioned in argument does not bring the question properly before [the Court]". *Mazer* v. *Stein,* 347 U. S. 201, 206, n. 5 (1954).

If the issue on this appeal were the one raised in the petitioners' supplemental brief, rather than the one stated in the petition for writ of certiorari and the earlier briefs, then it would be necessary to fully reconsider the procedural issues of mootness and abstention in that context.

First, the contention that the State of New Jersey is extending preferential treatment to strikers in the administration of welfare programs could present a factual issue requiring an evidentiary hearing. Furthermore, for the resolution of that factual issue to have any relevance to the petitioners and the respondent labor union, such a hearing would have to relate to administrative practices in June 1971 when the strike which led to this litigation occurred. Such a hearing would also have to focus on welfare board practices in Camden County and any other counties in which the petitioners' employees were living in 1971, since the federal categorical assistance programs and supplemental state programs in New Jersey are administered locally by county welfare boards and there are therefore some variations in administration from county to county. It is difficult to resist the conclusion that such a hearing, which could only yield findings concerning the administrative practices of certain county welfare boards in paying welfare benefits to strikers in 1971, would be an academic exercise. Therefore, even if the issue of whether the NLRA prohibits a state from paying strikers welfare benefits is "capable of repetition, yet evading review", *Southern Pacific Terminal Co.* v. *I.C.C.*, 219 U. S. 498, 515 (1911), the claim that the State conferred special benefits on the petitioners' striking employees in 1971 is in the realm of "abstraction, ambiguity and conjecture" which led the Third Circuit to conclude that the case was moot (App. 65).

Second, if the issue before the Court were whether the State could confer special benefits on strikers consistent with federal law, a significant abstention question would emerge. If it could be shown that special benefits were being paid to strikers, it is possible that the state courts would hold that the payment of such benefits is inconsist-

ent with state law. Under these circumstances, it would be appropriate for the federal courts to abstain from hearing the matter until after the state courts had had an opportunity to decide whether the state welfare administrators were acting in conformity with state law. *Railroad Com'n* v. *Pullman Co.*, 312 U. S. 496, 501 (1941); *Gibson* v. *Berryhill*, 411 U. S. 564, 574 (1973).

Finally, if it had been appropriately presented, the claim that the State was extending special benefits to strikers might have raised substantial questions concerning the conformity of the State's administration of the federal categorical assistance programs with the Social Security Act and the regulations adopted thereunder by the Department of Health, Education and Welfare. A strikers' entitlement to welfare benefits is a question of basic eligibility under the provisions of the federal categorical assistance program, which is amplified in detailed federal regulations promulgated by HEW setting forth circumstances under which an individual's refusal to accept work or to participate in a work training program may be grounds for refusing to take that applicant's needs into account in calculating the amount of a grant. 45 C.F.R. §220.35, *et seq.*; 45 C.F.R. §233.11. *Cf. New York State Department of Social Services* v. *Dublino*, 413 U. S. 405 (1973). See generally 42 U.S.C. §602(a)(19).* There-

* It also should again be noted that the Social Security Act (42 U.S.C. §602(a)(19)) does not authorize the disqualification of the entire family of an applicant who refuses to accept work or to participate in a work training program. See 45 C.F.R. §233.11. Whereas the original briefs for the petitioners seemed to urge that the NLRA would require a strikers' entire family to be disqualified from receiving assistance, the argument now presented apparently would restrict the disqualification to only the striker personally.

fore, if this case involved a comparison of the administrative screening by the State of New Jersey of applications for AFDC benefits by strikers and non-strikers this could raise questions concerning the State's conformity with the requirements of the Social Security Act and HEW regulations. This court has stated that HEW should be invited to participate as *amicus curiae* in cases involving the administration of the federal categorical assistance programs. *Rosado* v. *Wyman,* 397 U. S. 397 (1970). The fact that HEW's views have not been heard is a further reason for the Court to refuse to entertain the questions now introduced for the first time in the petitioners' supplemental brief.

For these reasons, it is respectfully submitted that the Court should reject the petitioners' belated attempt to have this appeal decided on the premise that New Jersey treats strikers differently from other needy persons who apply for welfare assistance. Rather, the only question properly before the Court is whether the payment of welfare benefits to strikers is *per se* inconsistent with the NLRA. To answer *this* question, the Court should look to the Social Security Act rather than the NLRA for the reasons expressed in detail in the State's original brief. Since the Social Security Act contains no express prohibition against the payment of welfare benefits to strikers and the legislative history of the Act shows that Congress has been aware of the controversy concerning this

issue, the Court should uphold the propriety of the payment of welfare benefits to needy persons on strike.

Respectfully submitted,

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